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In the Supreme Court of the United States

OCTOBER TERM, 1980

DICKEY FARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly interpreted a 1938 judgment of the United States District Court for the Eastern District of Washington as granting the United States an unrestricted flowage easement over petitioner's land up to 96 feet above mean sea level.

2. Whether petitioner was denied the equal protection of the laws where the government possibly paid another landowner twice for the same flowage easement and declined to make a similar double payment to petitioner.

3. Whether the filing of the condemnation petition estopped the government from relying on its rights under the 1938 judgment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-10), the memorandum and order of the district court, entered on April 18, 1977 (Pet. App. A-13 to A-20), and the findings of fact and conclusions of law of the district court (Pet. App. A-21 to A-36) are not reported.

JURISDICTION

The decision of the court of appeals was entered on September 5, 1980. A timely petition for rehearing was denied on December 1, 1980 (Pet. App. A-11 to A-12). The petition for a writ of certiorari was filed on February 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action was begun on July 25, 1975, with the filing in the district court of a complaint in condemnation and a declaration of taking, and the simultaneous deposit of $302,000 estimated just compensation (R. 1, 9).[1] The interest to be taken included the right permanently to flood certain land up to 83.9 feet above mean sea level for use in conjunction with the Bonneville Dam.[2]

Prior to trial the government discovered that the United States had already acquired a flowage easement over the land in question in a condemnation action, filed in 1937, that had concluded in a 1938 judgment. In the government's view the judgment awarded the United States an unrestricted flowage easement up to 96 feet above mean sea level.

The condemnation petition in the 1937-1938 action stated that the Bonneville Project was then expected to flood the lands permanently up to 72.5 feet above mean sea level, and that the natural flow of the Columbia River would periodically and occasionally raise the level of the river to 91 feet above mean sea level (C.A. App. 20).[3] It further recited that because of seepage, wave action, and the like, the Secretary of War had concluded that it was "necessary to acquire a flowage easement up to 96 feet above mean sea level" over the lands in question (*id.* at 20-21).

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[1]"R." refers to the Clerk's Record filed in the court of appeals.

[2]The United States also sought to acquire title to timber and improvements on the land and the continuing right to clear brush and debris and maintain mosquito control (Pet. App. A-2 to A-3).

[3]"C.A. App." refers to the appendix in the government's brief filed in the court of appeals. The parties asked the district court to take judicial notice of the presently existing record of the 1937-1938 proceedings in the district court, and that record was designated for inclusion on appeal. For the convenience of the court of appeals, copies of pertinent documents from the 1937 trial were reprinted in the government's opening brief on appeal. We are lodging a copy of that brief with the Clerk of the Court.

During the course of the trial leading to the 1938 judgment, the parties disagreed on exactly what interest was being condemned by the United States. The landowners argued that the government's right to flood the land was completely without restriction up to the 96-foot mark, and that the landowners' underlying fee was valueless. Thus, in their brief in that proceeding the landowners stated (C.A. App. 47-48):

> Would the United States, without further condemnation proceedings, or the acquiring of any easement other than that being herein condemned, and without payment of further damages, have a right to, for instance, raise the permanent pool level of the Bonneville Dam to an elevation of 90 feet, so long as such change affected no lands higher than 96 feet in elevation?
>
> It is the position of the defendants in this proceeding that the Government in this case will acquire "a flowage easement up to 96 feet above mean sea level" and that said easement will amount to "a perpetual right, power, privilege and easement", and that the first ten lines of paragraph IV [of the petition in condemnation] do not constitute a restriction upon the easement but rather descriptions of only the presently contemplated use. That a further use would be the right of the petitioner under the easement taken herein.

The United States argued, to the contrary, that it was taking a right of permanent flooding only up to 72.5 feet above mean sea level and a right occasionally and periodically to flood up to 96 feet (C.A. App. 51-55). It emphasized the landowners' continuing use of the land even with the easement imposed (*id.* at 52).

The landowners won this legal dispute in the proceeding leading to the 1938 judgment. Thus, in one of its instruc-

tions to the jury, the district court stated (C.A. App. 65):[4] "As you already know, throughout the progress of this protracted case the thing the Government is condemning here is a perpetual flowage easement without limitation or restriction up to an elevation of 96 feet above mean sea level." Similarly, another instruction stated (*ibid.*): "I charge you, therefore, that the owners, severally, of the parcels of land in question are entitled to the full value of their lands at and below 96 feet above mean sea level * * *."

The final judgment in the proceeding decreed a vesting in the United States of "the right and easement to overflow and flood each of the tracts of land described in [the condemnation petitions] up to the 96-foot contour line above mean sea level" (C.A. App. 85).

2. On the basis of the record in the 1937-1938 condemnation proceeding, the government filed a pretrial motion in this case to limit testimony to the value of rights other than the flowage easement (Pet. App. A-14). The district court denied the government's motion (*id.* at A-13 to A-20), and a trial was subsequently held to determine the value of the interests petitioned for. It resulted in a judgment for $522,000, plus interest (*id.* at A-35 to A-36).

3. On the government's appeal, the court of appeals reversed (Pet. App. A-1 to A-10). The court concluded that the plain language of the 1938 judgment, as well as the instructions indicating the basis for the jury's verdict in the 1937-1938 action, demonstrated that the 1938 judgment gave the government the right permanently to flood up to an elevation of 96 feet above mean sea level (*id.* at A-6 to A-8) and that the owners in that earlier action had been compensated for " 'the full value of their lands at and below' " that level (*id.* at A-8).

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[4]This language is taken from one of four jury instructions quoted verbatim in the landowners' petition for a new trial. The file did not contain a complete set of jury instructions.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The issues presented involve the construction and application of a judgment in a 1937 condemnation action, and they have little precedential significance. Review by this Court is accordingly unwarranted.

1. Contrary to petitioner's contention (Pet. 13-20), the court of appeals had ample support for its conclusion that in the 1937 condemnation action the United States paid for and acquired an unlimited flowage easement up to 96 feet above mean sea level. The easement was described in the judgment as "a flowage easement over each of [the tracts in litigation] up to 96 feet above mean sea level" and the jury instructions (pages 3-4, *supra*) clearly directed the jury to value the land as if an unlimited easement were being taken. These are clearly more relevant to a determination of the meaning of the judgment than isolated statements taken from the condemnation petition.

2. Petitioner's contention (Pet. 21-23) that the decision of the court of appeals denies it equal protection of the laws is without merit. Petitioner argues in effect that even if the court of appeals is correct in finding that the government had already paid for the flowage easement in question, the government must pay for the easement again if it erroneously overpaid any other landowners. In the absence of any showing that petitioner was deprived of such a windfall[5] on the basis of a suspect classification, the argument is frivolous.

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[5]The record shows that the land concerned here was in the ownership of the Dickey family in 1937-1938, when the original easement was acquired and paid for (May 17, 1977 Tr. 18). "Tr." refers to the transcript of proceedings in the district court.

In any event, it is not clear that petitioner was treated unequally in comparison with a number of similarly situated landowners. As noted above (pages 3-4), the United States originally sought to take an easement of less than 96 feet in the 1937 action involving petitioner's land and was forced to take a larger one by the condemnees. Petitioner has not shown that the condemnees in the original condemnation actions affecting the properties concerned in the cases cited at Pet. 22 succeeded in forcing the United States to acquire the larger easement. As for the million-dollar payment for a parcel bound by the 1938 judgment (Pet. 23), petitioner relies on assertions in oral argument by its counsel, and the record does not show whether the acquisition of rights in that parcel was in all other respects equivalent to the situation here.[6]

3. Finally, petitioner asserts (Pet. 23-29) that the United States should be estopped from asserting its previously acquired easement up to the 96-foot level. To the extent that this argument is a restatement of the one, made in the court of appeals, that the government is estopped from asserting title to the full easement simply because it initiated a condemnation action against such an easement naming petitioner as the owner, it should be rejected for the reason given by the court of appeals (Pet. App. A-6): "Initiation of a condemnation action does not constitute a waiver by the Government of previously acquired rights. *See United States* v. *93.970 Acres of Land*, 360 U.S. 328 (1959); *Mollohan* v. *Gray*, 413 F. 2d 349 (9th Cir. 1969) (dictum)."

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[6]We note that petitioner is not the only landowner against whom the United States has asserted prior ownership of the unrestricted 96-foot easement. The United States is asserting this position in at least two cases pending in the Eastern District of Washington: *United States* v. *85.32 Acres in Klickitat County, Wash. (Klickitat County Port District No. 1)*, No. C-74-314 (filed Dec. 31, 1974); *United States* v. *Sperry*, No. C-74-273 (filed Nov. 22, 1974).

Petitioner's contention that an estoppel should be found because petitioner detrimentally relied on the condemnation complaint and the payment of funds into the court before the government asserted the effect of the 1938 judgment is an argument that was not raised in the court of appeals and that, accordingly, should not be considered by this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, there is no merit to the claim. Petitioner does not assert that any "extensive diking and pumping" allegedly undertaken after the government filed the complaint in 1975 (Pet. 25) was rendered useless by the government's success in establishing that it need not pay now for a flowage easement that it had paid for in 1938. Petitioner is not aided by the two decisions of this Court on which it relies (Pet. 26-27). This is not a case in which the government has abandoned a taking (see *Danforth* v. *United States*, 308 U.S. 271, 284 (1939)) or a previous position regarding a state's jurisdiction over certain areas (*United States* v. *Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 73 n.97 (1969)), but rather one in which the government has abandoned a mistaken effort to acquire a property interest it had already taken and paid for pursuant to an earlier judgment reflecting the successful litigation effort of persons in privity with petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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